IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No.286 of 2002
with
APPEAL FROM ORDER No.287 of 2002

WITH
CIVIL APPLICATION No.4625 of 2002
in
APPEAL FROM ORDER No.286 of 2002

WITH
CIVIL APPLICATION No.4626 of 2002
in
APPEAL FROM ORDER No.287 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE RAVI R.TRIPATHI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? :

M S T C LTD.

Versus

VAKIL MUSHTAQBHAI NARSINH PROP. NABA SALES

Appearance:

1. Appeal from Order No. 286 of 2002

Mr.S.N. Soparkar with MS LILU K BHAYA for

the appellants.
MRS KETTY A MEHTA for Respondent

CORAM : MR.JUSTICE RAVI R.TRIPATHI

Date of decision: 19/07/2002

COMMON ORAL JUDGEMENT

With the consent of both the learned advocates, these matters are taken up for final disposal.

2. The Appeal From Order No.286 of 2002 is filed being aggrieved by the judgement and order dated 19.6.2002 passed by the learned 10th Joint Civil Judge (Senior Division), Vadodara below exhibit 5 in Special Civil Suit No.405 of 2002.

3. Appeal From Order No.287 of 2002 is filed being aggrieved by the judgement and order dated 19.6.2002 passed by the learned 10th Joint Civil Judge (Senior Division), Vadodara below exh.5 in Special Civil Suit No.363 of 2002.

4. The point involved in both these matters is common. The two suits are filed, one pertaining to Wanakbori Thermal Power Station, the other pertains to Gandhinagar Thermal Power Station. The facts in nutshell are that the appellants herein, MSTC Limited which is acting as a selling agent of Gujarat Electricity Board (hereinafter referred to as "the Board" for brevity) invited offers/ tenders for sale of 35,000 MTs of rejected coal of different lots, each of different weight, lying in the premises of Gandhinagar Thermal Power Station and to the extent of 76,000 MTs., lying at Wanakbori Thermal Power Station. It is the case of the appellants herein that the offers were invited on "as is where is" basis and on "no complaint" basis. It is also the case of the appellants that the rejected coal is the coal which is rejected on Bowl Mill of the Board. This rejected coal is dropped from hopper on concrete floor and the same is transported to the rejected coal yard. The appellants have specifically pleaded that there is no question of the Board adding any foreign material like stone, sand and dust. The Board is a public undertaking and it cannot have an intention of deteriorating the material-- the rejected coal by adding any foreign material. However, the rejected coal may contain some sand, dust or pieces of bricks.

5. Taking the glance at facts, on 20.9.2001 tenders were invited; on 2.11.2001 order was issued in favour of the plaintiffs, details to be set out hereafter. Terms and conditions of the transaction between the parties were agreed upon as per the tender document, terms of payment were also agreed upon. The payment was to be received by the appellants in 9 monthly instalments, payable on 7th of each month. The plaintiff paid the first instalment on 7.11.2001, he also paid the second instalment on 7.12.2001. On 7.12.2001 the plaintiff requested the Board for increasing the working hours. As the instalment which fell due on 7.1.2002 was not paid, on 21.1.2002 MSTC Limited, the present appellants requested the plaintiff for payment of the third instalment. On 31.1.2002 the request for payment of third instalment was repeated. The appellants did not received the third instalment, by that time the fourth instalment became due on 7.2.2002 which was also not paid. On 5.3.2002 the Board requested MSTC Ltd., the present appellants to take action for disposal of scrap for realising the blocked funds of the Board. On 6.3.2002 the Board requested the present appellants to take action for collection of money and also ground rent from the plaintiff. On 7.3.2002, fifth instalment became due which was also not paid.

6. It was on 19.3.2002 that the present appellants informed the plaintiff that the contract is terminated and that the Earnest Money Deposit (EMD) is forfeited. On 21.3.2002 the appellants wrote to the Bank for encashment of Bank Guarantee. The Board also wrote to the plaintiff to pay up the outstanding three instalments. As no payment was made by the plaintiffs on 10.4.2002 the Board informed the plaintiff not to send vehicles for lifting the goods. On 24.4.2002 the plaintiff filed two suits. Following are the prayers made in Civil Suit No.363 of 2002 :

"(i) Declare that the defendants have not sold the goods of quality, which was agreed to in the contract.

(ii) Declare that the defendants have committed breach of contract.

(iii) Direct the defendants to sell the goods of proper quality, i.e. goods without sand, bricks and dust to the plaintiff.

(iv) The forfeiture of EMD by defendant no.1

(present appellant no.1) is illegal and that permanent injunction be granted injuncting from forfeiting the deposit.

(v) Defendant no.1 has cancelled the tender of the plaintiff. Said act be declared as illegal and that permanent injunction be issued injuncting the defendants from cancelling the tender of the plaintiff.

(vi) The plaintiff has paid the amount of second instalment and still the defendants have not given delivery of 60,000 MTs of rejected coal. The same be ordered to be delivered.

(vii) Defendant no.1 has entered into a contract of selling the rejected coal of the Gujarat Electricity Board with the plaintiff and therefore, it should be declared that the defendant has no right to sell the said goods. In the alternative it was prayed that the defendants shall pay the amount of deposit of Rs.45,98,000/-, to the plaintiff.

(viii) The defendants be injuncted from encashing the Bank Guarantee given by the plaintiff at the time of the aforesaid contract and the defendants should not proceed in that direction. If at all they have encashed the Bank Guarantee the same should be returned to the plaintiff or the same should be deposited in the Bank."

7. In these Appeals From Order we are concerned with the orders passed by the Court, below exh.5 application to the effect that,

"The plaintiff's application is hereby allowed. The defendants are hereby restrained from entering into agreement for the whole contracted rejected coal till final disposal of the suit along with the coal for the which the plaintiff had already paid.

The defendants are also directed not to transfer the contractual amount to anybody else or their own use."

8. The reliefs in Civil Suit No.405 of 2002 are also on the same lines and the order passed by the court below being common, was assailed by the learned counsel

Mr.Soparkar appearing with learned advocate Ms.L.K. Bhaya. Mr.Soparkar submitted that the present suits are not maintainable because the subject matter of contract of which specific performance is sought for is a movable property and unless there is a specific reason, as contemplated in section 10 of the Specific Relief Act, 1963 (hereinafter referred to as "the Act"), no specific performance could have been prayed for. The learned counsel also submitted that in fact as contemplated under section 14 of the Act, the contract in question falls within clause (a) of subsec.(1) of sec.14. Sec.14 provides for "Contracts not specifically enforceable". Subsec.(1) provides that the following contracts cannot be specifically enforced, namely,

> "(a) a contract for the non performance of which compensation in money is an adequate relief;"

The counsel emphatically submitted that in the present case the commodity which is the subject matter is rejected coal. It is a commercial item and as is the case of the plaintiff, he has agreed to purchase the same only for the purpose of selling it further as he trades in rejected coal. Therefore, non performance of the contract will in any case be such wherein compensation in money will be an adequate relief.

9. The learned counsel also submitted that in the plaint it is not the case of the plaintiff that the commodity which was contracted to be purchased was not such which does not have ready market, or that there are no standards to ascertain the damages. It was emphatically argued that it is the case of the plaintiff that what was sought to be purchased was 'rejected coal' and that the appellants are not delivering the 'rejected coal'. Assuming that it is so, then the Court ought not to have injuncted the defendants from selling the commodity which according to the plaintiffs is not 'rejected coal'. In the alternative, he submitted that if it is the rejected coal, then there was no reason for the plaintiffs not to take the delivery of the commodity by saying that it is not rejected coal. He also submitted that the contract was for a movable property and 'non performance of the contract' could have been compensated in terms of money, therefore the Court below has erred in restraining the defendants from entering into the agreement for the whole contracted rejected coal till final disposal of the suit, that the court has also erred in directing the defendants not to transfer their contractual amount to anybody else or for their own use,

the learned Judge lost sight of an important fact that the commodity under contract was 76,000 MTs at Wanakbori and 35,000 MTs at Gandhinagar, a judicial notice could have been taken that looking to such a large quantity it could not have been possible for a public undertaking to put any foreign particles in the commodity under contract.

10. From the record it appears that the whole trouble started while taking delivery of the second consignment, when the plaintiffs complained that the commodity (rejected coal) contains sand, dust and pieces of bricks. Any observations from this Court at this stage may prejudicially affect the rights of either party at the time of trial of the suit. The quantity involved is not only huge, but very huge, the tenders were invited wherein it was specifically mentioned that the same are invited on, 'as is where is' and 'no complaint' basis. The learned counsel invited attention to the Specific Terms and Conditions (STC) of tender wherein condition no.1 is as under :

"MSTC through its Vadodara Branch, acting as Selling Agents of the Owner/ Stockholder (hereinafter referred to as Principal) of the materials on whose behalf MSTC will be selling the materials, invites offers for purchase of materials as described in Schedule of Item(s)/ Rate(s) on "AS IS WHERE IS" and "NO COMPLAINT" basis."

11. Term no.2 pertains to inspection. Term no.2.1 is important for reconsideration because under that term the material offered for sale was to be inspected by the person who intends to fill up the tender. Item 2.1 reads as under:

"2.1 The materials offered for sale as described in the Schedule of Item(s)/ Rate(s) attached hereto, may be inspected on any working day with prior permission of the Principal within the time schedule indicated on the cover page of this Tender document, which is an integral part of the Terms and Conditions of this Tender."

12. So far as the General Terms and Conditions (GTC) of Tender, they also contain a condition no.5 titled as "Quality and Quantity", wherein condition 5.1 is very clear, which reads as under:

"5.1 The goods will be sold on "As is where

is" and "No complaint basis" insofar as physical condition of the same is concerned. The Tenderer(s) will therefore, be deemed to have made themselves aware of the physical conditions, dimensions, size, weight, working conditions, etc. by inspecting the materials before submitting their Tender and no complaint nor any claim in this regard will be entertained by MSTC after the submission of the tender."

Condition 5.3 is also relevant for our purpose, which reads as under:

"5.3 Where goods are sold on "Lot" basis and not by unit weight. number basis, the entire material lying in the lot will have to be lifted by the Buyer(s) so as to clear the entire lot. The quantity if indicated against the respective lots are purely indicative and without any guarantee and MSTC/ Owner shall not entertain any claim/ complaint from the Buyer(s) fro any deficiency in quality, quantity, size, dimension or for refund of whole or any part of the purchase money or loss of profit of interest. damages or otherwise."

It may also be noted here that condition no.6 pertains to inspection and condition no.6.2 is again relevant for our purpose which says that:

"6.2 The materials quoted for may be inspected at the appropriate site(s) as indicated in the schedule of Item(s)/ Rate(s) and Tenderer(s) should thoroughly satisfy themselves about the nature, condition, quality of the materials and working conditions.

MSTC/ principal gives no guarantee or warranty as to the conditions of the material or its quality or its fitness for any specific purpose of use. It should be clearly understood that no claim/ complaint about the quantity, quality, condition, fitness for use shall be entertained by MSTC/ Principal.

13. This Court is not going deeper into the details for the simple reason that the present Appeal From Order is against an interlocutory order and the main question with which this Court is confronted with, at present is, as to whether during pendency of the suit the Court below is right in issuing injunction by its order dated

19.6.2002.

14. The learned advocate Mrs.Mehta, appearing for the respondent herein-- original plaintiff submitted that they had agreed to purchase the contracted commodity at the rate of Rs.650/-, per tonne while earlier defendant no.2 had sold the commodity at the rate of Rs.300/-, per MT. She also emphasised that it was only when the plaintiff was taking delivery of the goods, defendant no.2 used bulldozer due to which the sand, dust and other foreign particles got into, the contracted commodity. The plaintiff therefore, invited the attention of the defendants to the said fact but they did not get any response from them. On the contrary they found that the defendants have filed a caveat application before the Court which led the plaintiff to believe that they had no other alternative than to approach the court by filing the suit. The Court for the present is not examining as to whether the plaintiff addressed all the letters alleged by them at the relevant time or not, because that will be examined by the trial court at the time of trial.

14.1 The question before this Court is only as to whether in the aforesaid set of circumstances which are narrated hereinabove when tender was invited on "as is where is basis and no complaint" basis, it was the duty of the tenderer to inspect the quantity, quality and condition of the commodity under contract, taking into consideration the nature of commodity being rejected coal, which is definitely a movable property, and is not purchased by the tenderer for any specific use either by himself or any other party, but it is to be sold in open market as a commercial commodity and the court below was justified in granting injunction as is ordered by order dated 19.6.2002.

15. The learned counsel appearing for the appellants invited attention of this Court to the judgments of this Court (i) in the matter between Gujarat Electricity Board v. M/s Maheshkumar & Co., reported in 1982 (2) GLR 479, (ii) in the matter between Aziz Traders v. Chairman, Gujarat Electricity Board and others, reported in 1986(1) GLR 171.

16. In the present case the learned Judge seems to have lost sight of the fact that the quantity under contract was very huge and even at the cost of repetition, it is to be stated that the quantity was 76,000 MTs at Wanakbori Thermal Power Station and 35,000 MTs at Gandhinagar Thermal Power Station, in view of that one would not have thought of adulterating the same

(rejected coal) by putting foreign articles like sand, dust and brick pieces. The Court was also required to take into consideration that if the defendants are restrained from contracting for disposal of this commodity till disposal of the suit, there will be a practical problem of storing of additional rejected coal, which is a matter of daily occurrence at a Thermal Power Station. Besides, the Court was also required to take into consideration that, 'non performance of the contract could be compensated in terms of money or not.

17. The arguments of Mrs.Mehta regarding the word, 'adequate' in clause (a) of subsection (1) of section 14 of the Specific Relief Act, 1963 is not acceptable for the reason that there are no averments in the complaint that the commodity was such with regard to which non performance cannot be compensated in terms of money. Mrs.Mehta submitted that the plaintiff had entered into the contract for the purpose of its business and only 'getting compensation in terms of money' will not be an adequate relief to the plaintiff. She submitted that loss of business is something which is different than loss in terms of money. The plaintiff is deprived of his business because the defendants have terminated the contract and therefore, he will not be able to supply to his customers the contracted commodity and by that he will be out of business. She submitted that only because the defendants, if the plaintiff succeeds in the suit, will be directed to compensate the plaintiff for the loss suffered by him in terms of money, will not be an adequate relief qua the business of the plaintiff. In common understanding, 'the business' is for the purpose of 'earning profit' and when the loss which is likely to be suffered by the plaintiff on account of loss of business, can be compensated in terms of money, it will be an adequate relief. The contention raised by Mrs. Mehta is rejected. Mrs.Mehta also submitted that the commodity under contract was non perishable goods and therefore, the learned Judge was right in granting injunction because if the commodity is of non perishable nature, specific performance can be granted, which is not granted in cases, when the commodity is perishable in nature. The nature of the commodity, namely, perishable or non perishable may be one of the factors which is required to be looked into by the court while considering the question of granting of specific performance, but at the same time the Court has to keep in mind the other factors also, which are provided under section 14 of the Specific Relief Act, 1965, which provides for certain contingencies in which the contracts are not specifically enforceable. In the present case, it is the contract, in

which as discussed hereinabove, compensation in terms of money, will be an adequate relief and therefore, the argument regarding the nature of contracted commodity being non perishable, does not find acceptance with this Court and the same is rejected.

18. Learned advocate Mrs.Mehta invited attention of this Court to the decision of this Court in the matter between Sandeep Cement (P) Ltd. v. Union of India and others, reported in AIR 1990 Gujarat 140. Mrs.Mehta submitted that in that case the commodity in question was the coal and the Court had held that non delivery of the commodity will adversely affect the party and monetary compensation will not be an adequate relief and the Union of India was directed to deliver the goods in kind.

19. The facts before the Court in that case were that, the petitioners therein had consigned coal at Rurkela in a Broad Guage (BG) wagon to be delivered at Mahuva. The coal was transhipped from the BG wagon into 3 small Meter Guage (MG) wagons at Sabarmati. Out of the said three MG wagons, two of them bearing nos.60718 and 3206 were delivered at Mahuva. The third wagon bearing no.53024 containing 13,320 MTs was not delivered. It was in these facts that the Court was pleased to uphold the contention of Mr.Sompura, learned advocate appearing for the petitioner that,

> "4. Mr.Sompura has urged that compensation is not an adequate relief as the mineral coal is not available freely and therefore, the consignee is entitled to the goods in kind and not in money by way of compensation. The submission of Mr.Sompura is quite correct and is accepted. The Railway Administration being a monopoly national carriers on payment of the fixed freight, they are bound under the contract to deliver the goods in kind especially if the goods are of a nature which need to be delivered in kind. In the facts and circumstances of the case, it would not be proper to direct the respondents to pay monetary compensation. Hence it is directed that a writ of mandamus will issue against the respondent Railway Administration to deliver the coal in question to the petitioner weighing 13,320 MTs within five weeks from today."

20. In the present case, the commodity under contract is 'rejected coal'. It is not the case of the plaintiff that he was purchasing the 'rejected coal' for a specific purpose, it was only for the purpose of trade in that

commodity. The commodity is a 'commercial commodity' available in the market and therefore, the ratio of the aforesaid judgement has no application to the present case.

21. Mrs.Mehta, learned advocate appearing for the respondent submitted that as is held by Delhi High Court in the matter of Wellman Hindustan Ltd. v. N.C.R. Corporation, reported in A.I.R. 1993 Delhi 32, that when the plaintiff has complied with the terms of the agreement for a long time and as has spent considerable amount, an injunction is a natural consequence. Para 22 is as under:

> "At this stage only prima facie nature of the case is to be seen and not to decide the case finally. On prima facie grounds, the plaintiffs/ applicants have a good case inasmuch as they have been able to show that the parties had acted upon the terms of the letter of intent dated 10.6.1986 for a long period of time and they had expended considerable sums of money in reliance on them. The balance of convenience is also in their favour and in case the defendants induct a third party as their joint venture partner and/or associate for manufacturing, marketing and servicing of their products, the plaintiffs are bound to suffer irreparable loss and injury."

22. In the present case, it is contended that the plaintiff has complied with the terms of agreement for a long time and spent considerable amount by way of payment of two instalments of Earnest Money Deposit (EMD). But in fact, in all, nine instalments were to be paid, the first instalment was due on 7.11.2001, the second instalment was due on 7.12.2001, both were paid. But thereafter, 3rd, 4th and 5th instalments, which fell due on 7.1.2002, 7.2.2002 and 7.3.2002 were not paid. So far as EMD is concerned, this Court is not examining that question for the reason stated hereinabove as the Court is considering only about the prima facie case and the propriety of granting injunction by the court below. Out of the nine instalments, if only two instalments are paid, it cannot be said that the plaintiff had spent considerable amount, this argument does not find favour with the Court.

23. The learned advocate Mrs.Mehta submitted that everything was in a time frame and the plaintiff was to take delivery, in a time frame after making payment of instalments, under the contract, 30th June was the date

by which the plaintiff was expected to lift 60% of the quantity at Wanakbori, terminating the contract before that date on 19.3.2002 is not legal and forfeiture of EMD is also illegal. This argument can well be appreciated only when full evidence is led. Therefore, this Court does not express any opinion on this aspect.

24. The learned counsel for the appellants submitted that in view of Conditions No.8, 9 & 12 of the General Terms and Conditions (GTC) of Tender, the defendants were right in their action of terminating the contract. As the argument of Mrs.Mehta is not answered, the Court does not express any opinion on this also, leaving it open for the parties to contest the same at the trial by leading necessary evidence.

25. Mrs.Mehta, learned advocate for the respondent submitted that it may be observed that in case the plaintiff succeeds, the defendants will return the EMD with commercial interest. The Court feels it to be premature at this stage for the simple reason that in the event of the plaintiff succeeding, the trial court will consider the question of granting appropriate releif(s) to the plaintiff which may include an order to return EMD with interest at the rate prescribed by the court, after taking into consideration various factors. Hence the submission of Mrs.Mehta is rejected.

26. At the joint request of the parties, both the suits are expedited as both the advocates have assured that their counterparts will not be seeking any avoidable adjournments and that they will cooperate in expeditious hearing. The trial court is directed to dispose of the suits latest by 31.1.2003.

27. In view of the provisions of Specific Relief Act, 1963, this Court is of the opinion that no such injunction could have been granted, hence the present Appeals From Order are allowed.

28. Consequently, no orders on Civil Applications No.4625 of 2002 and 4626 of 2002. They stand disposed of.

(Ravi R. Tripathi, J.)

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